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UNITED STATES OF AMERICA  
13

14 UNITED STATES DISTRICT COURT

15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 JOHN JACOB OLIVAS,

20 Defendant.  
21  
22

ED CR No. 18-231-JGB

GOVERNMENT'S OPPOSITION TO  
DEFENDANT'S MOTION *IN LIMINE* TO  
PRECLUDE VOUCHING (DKT. 73)

Hearing Date: November 15, 2021

Hearing Time: 2:00 P.M.

Location: Courtroom of the  
Hon. Jesús G. Bernal

23 Plaintiff United States of America, by and through its counsel  
24 of record, the Acting United States Attorney for the Central District  
25 of California and Assistant United States Attorneys Eli A. Alcaraz  
26 and Frances S. Lewis hereby files its opposition to defendant's  
27 motion in limine to preclude vouching (dkt. 73).  
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1        This opposition is based upon the attached memorandum of points  
2 and authorities, the files and records in this case, and such further  
3 evidence and argument as the Court may permit.

4        Dated: October 26, 2021

Respectfully submitted,

5                                TRACY L. WILKISON  
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9                                      /s/        
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant John Jacob Olivas ("defendant") used his position and  
4 power as a federal law enforcement agent to sexually abuse two of his  
5 intimate partners and prevent them from reporting his assaults to law  
6 enforcement. Defendant's abuse of his federal law enforcement  
7 authority violated the victims' constitutional rights: namely, their  
8 rights to liberty and bodily integrity. For three specific sexual  
9 assaults of K.L. and N.B., defendant is charged with three counts of  
10 deprivation of rights under color of law, in violation of 18 U.S.C.  
11 § 242.

12 Defendant moves in limine for an order preventing the government  
13 from doing what the law is already clear the government cannot:  
14 vouching for the credibility of its witnesses. Defendant appears to  
15 take a rigid linguistic view and seeks targeted prohibitions on  
16 specific words during trial. The government does not dispute that in  
17 closing argument it is precluded from, for example, standing up and  
18 arguing to the jury: "I believe these victims, therefore you should  
19 too." See United States v. Roberts, 618 F.2d 530, 533 (9th Cir.  
20 1980) ("It is improper for the prosecution to vouch for the  
21 credibility of a government witness. Vouching may occur in two ways:  
22 the prosecution may place the prestige of the government behind the  
23 witness or may indicate that information not presented to the jury  
24 supports the witness's testimony.")

25 Defendant's motion, however, goes beyond asking the Court to  
26 affirm the law. Without the benefit of any context, defendant seeks  
27 to have the Court ex ante preclude the government from using common  
28 phrases like "I believe" and "we know." This would sweep in all

1 kinds of unobjectionable phrases like, "I believe we started trial on  
2 Tuesday in this case," and "we know that this happened while  
3 defendant was an HSI special agent because he was employed as one at  
4 the time," neither of which is remotely objectionable. See United  
5 States v. Weatherspoon, 410 F.3d 1143, 1173 (9th Cir. 2005) (Trott,  
6 J., concurring in part and dissenting in part) ("Is it vouching every  
7 time a lawyer says 'I believe,' or 'I submit,' or 'I think?' Of  
8 course not, but our opinions too often jump inappropriately to the  
9 conclusion that such formulations necessarily amount to impermissible  
10 'vouching.'"); United States v. Younger, 398 F.3d 1179, 1191 (9th  
11 Cir. 2005) ("We emphasize that prosecutors should not use 'we know'  
12 statements in closing argument. Nonetheless, the record in this case  
13 confirms that the prosecutors used the phrase 'we know' to marshal  
14 evidence actually admitted at trial and reasonable inferences from  
15 that evidence, not to vouch for witness veracity or suggest that  
16 evidence not produced would support a witness's statements.").

17 Not only is defendant's motion narrowly focused on words without  
18 context, but it is premature. The Ninth Circuit requires a defendant  
19 to object when he believes the government has gone too far. United  
20 States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993) (explaining  
21 requirement to object to vouching at trial). Filing a motion in  
22 limine to preclude "vouching" does not relieve defendant of this  
23 obligation. There is simply no way for this Court to determine in a  
24 void what statements would or would not constitute vouching, and the  
25 Court should decline defendant's invitation to do so.

## 26 **II. ARGUMENT**

27 "[V]ouching consists of placing the prestige of the government  
28 behind a witness through personal assurances of the witness's

1 veracity, or suggesting that information not presented to the jury  
2 supports the witness's testimony." United States v. Ruiz, 710 F.3d  
3 1077, 1085 (9th Cir. 2013) (quotation omitted); Necoechea, 986 F.2d  
4 at 1276. The government agrees with defendant that the first form of  
5 vouching occurs when the prosecutor asserts a personal opinion of the  
6 credibility of a witness. See United States v. Young, 470 U.S. 1, 11  
7 (1985); Ruiz, 710 F.3d at 1085.

8 Courts, however, should examine "arguments in the context of the  
9 arguments that they rebut." United States v. Wilkes, 662 F.3d 524,  
10 539 (9th Cir. 2011); Young, 470 U.S. at 11 ("[A] criminal conviction  
11 is not to be lightly overturned on the basis of a prosecutor's  
12 comments standing alone, for the statements or conduct must be viewed  
13 in context; only by doing so can it be determined whether the  
14 prosecutor's comments affected the fairness of the trial."). For  
15 example, "a prosecutor may respond substantially to a defense  
16 counsel's attack in order to right the scale." United States v.  
17 Doss, 630 F.3d 1181, 1194 (9th Cir. 2011). Describing a witness's  
18 role, experience, and knowledge is not vouching for the witness's  
19 credibility. See Doss, 630 F.3d at 1193 (government did not vouch by  
20 pointing out that informant's status as a convicted felon "uniquely  
21 situated" him in a position to overhear the defendant's statements in  
22 inmate-transportation van). Even an express credibility endorsement  
23 might be permissible in response to a defendant's repeated attacks on  
24 the witness's credibility. See United States v. Wallace, 848 F.2d  
25 1464, 1474 & n.16 (9th Cir. 1988); see also Necoechea, 986 F.2d at  
26 1279 (in context, "I submit to you that she's telling the truth" was  
27 not vouching); see also Doss, 630 F.3d at 1194-95 (government's  
28 rebuttal remarks appropriate response to defense's allegations that

1 the government had "cooked" the case in order to win); United States  
2 v. Sayetsitty, 107 F.3d 1405, 1409 (9th Cir. 1997) (closing argument  
3 appropriate response to defense counsel's characterization of case as  
4 "web of deception").

5 The Court cannot rule in advance of trial whether certain  
6 statements by the government will or will not constitute vouching  
7 because so much of the analysis depends on context. "[S]tatements  
8 made by the prosecution do not constitute improper vouching where the  
9 argument that witnesses had no motive to lie is a permissible  
10 response to the defense counsel's earlier attacks on the witnesses's  
11 [sic] credibility." Wilkes, 662 F.3d at 540. Furthermore,  
12 statements that "witnesses had no motive to lie" are not vouching  
13 when they are "simply inferences from evidence in the record."  
14 United States v. Nash, 115 F.3d 1431, 1439 (9th Cir. 1997); see also  
15 United States v. Crosby, 748 Fed. App'x 752, 753 (9th Cir. 2018)  
16 ("The prosecutor's statement that the government's witness . . . had  
17 no 'dog in the fight' and submission that it was reasonable to  
18 believe [she] testified truthfully did not cross the line" where  
19 "viewed in context, [the statement] was an argument of 'inference  
20 from evidence in the record' rather than vouching.").

21 As these cases illustrate, context matter. The case put on by  
22 defendant matters. Where a defendant attacks the credibility of the  
23 government's witnesses, the government is allowed to push back.  
24 "Prosecutors can argue reasonable inferences based on the record, and  
25 have considerable leeway to strike hard blows based on the evidence  
26 and all reasonable inferences from the evidence." United States v.  
27 Tucker, 641 F.3d 1110, 1120 (9th Cir. 2011) (streamlined). Indeed,  
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1 "hard blows" are "often the essence of argument." United States v.  
2 Sarno, 73 F.3d 1470, 1496 (9th Cir. 1995).

3       Simply put, this is not an issue that can be decided in a motion  
4 in limine -- if the government makes a statement that defendant  
5 concludes has crossed the line from arguing into vouching, defendant  
6 needs to object. Only then, with the benefit of context, will the  
7 Court be equipped to evaluate whether the arguments are appropriate  
8 or not.

9 **III. CONCLUSION**

10       For the foregoing reasons, the government respectfully requests  
11 that this Court deny the defendant's motion in limine (dkt. 73).  
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